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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 854

FOY O. WILEMON AND AMOS E. WILEMON, doing business under the trade name of Good Luck Oil Company, A Partnership,

Petitioners,

VS.

PRENTISS M. BROWN, Administrator, office of Price Administration, et al., (CHESTER BOWLES, Substituted as party Appellant in the place and stead of PRENTISS M. BROWN),

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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IN THE

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No.———

FOY O. WILEMON AND AMOS E. WILEMON, doing business under the trade name of Good Luck Oil Company, A Partnership,

Petitioners,

VS.

PRENTISS M. BROWN, Administrator, office of Price Administration, et al., (CHESTER BOWLES, Substituted as party Appellant in the place and stead of PRENTISS M. BROWN),

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Supreme Court of the United States:

Now come Foy O. Wilemon and Amos E. Wilemon, doing business under the trade name of Good Luck Oil Company, a partnership, hereinafter called Petitioners, and petition-

ing for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

Statement of the Case

Foy O. and Amos E. Wilemon, doing Business under the trade name of Good Luck Oil Company, a partnership, own and operate a chain of seven retail gasoline filling stations in the City of Dallas, Texas. And they also own the real estate on prominent business corners of the City of Dallas, upon which they have erected magnificent structures and equipment to house their business. Their sales of gasoline and other petroleum products, together with their repair and accessory business, amounts to more than $1,000,000 per year. Exclusive of their good will and trade name which they have built up over a period of more than twelve years, they have an investment of well in excess of a million dollars. (R. 3).

On or about May 1st, 1943, they were served with an "order" by Talbot Smith, Regional Attorney for the Office of Price Administration, Region V, commanding them to appear before Israel Treiman, "Hearing Commissioner", on May 7th, 1943, to show cause why they should not be suspended from further engaging in and carrying on their business for such time as the "Hearing Commissioner" might deem proper, for having violated certain provisions of Ration Order 5C. (R. 14-16). The "Charges" against them were, (1) On or about April 8th, 1943, they, as a licensed distributor, and accountable for all gasoline cou-

pons and other evidences received by them, did not have in their possession or control, coupons or other evidences in gallonage value, which, when added to the gallonage represented by exchange certificates which had been transmitted to the State Motor Fuel Tax Administration, a total of all coupons or other evidence deposited in their ration bank account, equivalent in gallonage value to the number of gallons which they had transferred at said time. (R. 15)

(Note: by this charge is meant that Petitioners had sold more gasoline than they had ration coupons to show for.)

(2), On April 8th, 1943, they had in their possession about 1,063 No. 6 Class A Ration Coupons, which they had accepted in exchange for gasoline prior to the effective date of said No. 6 Class A Ration Coupons.

(3), They had in their possession coupons issued as a ration, or part of a ration book, to which they were not entitled, and which they had not acquired in accordance with the provisions of Ration Order 5C. (R. 15).

(Note: Charges (2) and (3) constitute the same transaction, but is charged twice in different language).

(4), They accepted coupons in exchange for gasoline on or about April 8th, 1943, upon which there had not been then and there clearly written, on the reverse side of each such coupon by the person to whom it was issued, the information required in Ration Order 5C. (R. 15).

(Note: That Petitioners did not make the purchasers of gasoline write the License number and state of registration of their motor vehicles on the back of the coupon.)

The hearing before the "Hearing Commissioner" was passed from May 7th, 1943, until May 17, 1943, at which time Petitioners appeared in "obedience" to the "order" of the Regional Attorney, and after the completion of the hearing, at which they proved to the satisfaction of the "Hearing Commissioner" (R. 98-99) they were not guilty of any of the charges, but admitted that they had received the Class A No. 6 coupons alleged prior to their effective dates, but had done so on the advice of the Dallas County Rationing Board (Bettie Wolfe R. 62-77) that they could accept the coupons in advance of their due date and hold them until such date as they would become due, if they had enough gasoline on hand so to do, and then turn them in.

After having announced at the hearing in an oral opinion (R. 98-99) that he had absolved Petitioners from all charges save and except that they had accepted the 1,066 No. 6 Class A Coupons prior to their effective date, and further announced, although this does not appear in the Record or Proceedings, that he "was willing to concede they had accepted these coupons in good faith, but they were guilty of gross negligence in not reading and informing themselves of the rules and regulations issued", the "Hearing Commissioner" on May 25th, 1943, issued

his "order" suspending Petitioners "from selling, transferring, or dealing in gasoline for a period of two (2) weeks, commencing at 12.01 A. M., June 14, 1943, and ending at 12.01 A. M., July 1, 1943. (R. 18).

From this order of the "Hearing Commissioner", Petitioners timely filed their petition for review to the "Hearing Administrator at Washington, D. C., in accordance with Procedural Regulation No. 4, and on July 20th, 1943, Gerome Walsh, "Acting Deputy Hearing Administrator", affirmed the order and judgment of the "Hearing Commissioner" and re-fixed the date of suspension, and adding a couple of days from 12.01 A. M. August 8, 1943 to 12.01 A. M. August 25, 1943. (R. 18-22).

August 7th, 1943, Petitioners after so exhausting their administrative remedies, filed their petition in the District Court of the United States for the Northern District of Texas, seeking to restrain the enforcement of this penalty, alleging such penalty was in violation of Articles I and III of and Amendments V and X to the Constitution of the United States, and such penalty involved was of more than the value of Three Thousand Dollars. (R. 1-9). By agreement the enforcement of the penalty was stayed pending the final disposition of the suit, (R. 8), making it unnecessary to seek temporary restraining order and injunction.

The cause was tried on its merits, September 27th, 1943, and on September 29th, 1943, the Honorable William H.

Atwell, United States District Judge, delivered and filed his written opinion, sustaining the position of Petitioners (R. 99-106), and, in accordance with said Opinion, Final Judgment, permanently restraining the Office of Price Administration from enforcing this penalty was entered October 2nd, 1943. (R. 107).

The Office of Price Administration, Appellants below, on October 18, 1943 (R. 108, 110) duly filed their notice of appeal. The case was submitted by briefs and oral arguments December 13, 1943, and on January 13, 1944 the United States Circuit Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court of the United States for the Northern District of Texas with directions to dismiss the injunction (R. 116), and judgment was entered accordingly (R. 122).

On February 3, 1944, and within the time allowed, Petitioners filed their motion and brief for rehearing, which was by the Court on March 3, 1944, denied without written opinion (R. 158). On March 8, 1944, upon application by Petitioners (R. 159), mandate was stayed for a period of thirty days (R. 162) pending this petition for certiorari.

Statement as to Jurisdiction

This cause originated in the District Court of the United States for the Northern District of Texas upon Petitioners' complaint seeking to enjoin the Office of Price Admin-

istration, an agency of the United States government, from enforcing administrative penalties against Petitioners. Upon judgment granting such relief, the Office of Price Administration appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said Court reversed and remanded the cause and thereafter overruled petition for rehearing.

Jurisdiction of this cause is conferred upon the Supreme Court of the United States: (1) By Section 347a, U. S. C. A., Title 28; (2) violation by the Office of Price Administration of the Constitution of the United States is involved; (3) Paragraph 5(b) of Rule 38, Court Rules of the Supreme Court of the United States, in that (1) the United States Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; (2) has decided a federal question in a way probably in conflict with applicable decisions of this Court; and (3) has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Questions Presented

1.

Whether Congress by the enactment of the Act of June 28, 1940, as amended by the Act of May 1, 1941 (Priorities and Allocations Act), and by Title III of the Second War Powers Act, delegated or attempted to delegate to executive

and administrative agencies power to suspend business covered by such Act by administrative procedure.

Petitioners alleged in their complaint (R. 6-8) and the trial court found (R. 104): "The Congress did not vest in the defendant such a power as is here exhibited."

2.

Whether Congress, if it did or intended so to do, acted within its constitutional limitations.

Petitioners alleged in their complaint (R. 6-8) that if Congress delegated or attempted to delegate such powers to the executive, it acted in violation of Articles 1 and 3 of and Amendments 5 and 10 to the Constitution of the United States, and the trial court found (R. 104): "If it did, it presmued to act improperly, which presumption will be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the Board".

3.

Whether an injunction granted by a trial court, restraining the enforcement of an administrative penalty, may be set aside where it is neither shown nor urged that there was an abuse of discretion.

Petitioners alleged in their complaint (R. 6), and the Hearing Commissioner found that the violation for which

he suspended Petitioners' business was not a wilful violation, but the suspension order was entered on account of the gross negligence of Petitioners. The trial court in its opinion (R. 100) emphasized this point, and quoted from the Hearing Commissioner's finding: "They had not wilfully violated this provision, but they had been guilty of gross negligence and carelessness, warranting a severe penalty".

Reasons Relied Upon for the Allowance of the Writ

1.

In holding that Congress intended to and did delegate to the Office of Price Administration power and authority to administer administrative suspensions which amount to penalties fixed for past violations, the United States Circuit Court of Appeals for the Fifth Circuit decided an important question of federal law in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decisions in *Adkins vs. Childrens Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394; *Panama Refining Co. vs. Ryan*, 293 U. S. 386, 79 L. Ed. 446; *Schecter vs. U. S.* 295 U. S. 494, 79 L. Ed. 1570; *Wallace vs. Cutten*, 298 U. S. 229, 80 L. Ed. 1157; *U. S. vs. La France*, 282 U. S. 567, 75 L. Ed. 551; and *O'Sullivan vs. Felix*, 233 U. S. 318, 58 L. Ed. 980.

2.

The Congress of the United States provided in subdivision (a) of Section 925, Title 50 U. S. C. A. (the enforcement provision of the law here in question): "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904, Title 50, U. S. C. A.) he may make application to the appropriate court for an order enjoining such acts or practices * * *". Both the Hearing Commissioner and the United States District Judge found that Petitioners had not wilfully violated any provision of Ration Order 5c, and there was no evidence of any continued violation or attempts to continue to violate any of such orders. The above quoted Act clearly gives the United States District Courts jurisdiction of proceedings thereunder. Petitioners' complaint to enjoin the enforcement of the penalty of suspension administratively fixed by the Office of Price Administration clearly presented all equitable features to the trial court for its disposition. The Hearing Commissioner held and the trial court found in its opinion (R. 100) that the violation for which the administrative suspension was assessed was an isolated one and was not a wilful violation, and when the United States Circuit Court of

Appeals reversed and remanded this cause to the trial court with direction to dismiss the injunction, it decided an important question of federal law in a way to conflict with the applicable decisions of the Supreme Court, and particularly in conflict with *Hecht Co. vs. Bowles*, 88 L. Ed. 465, reported in Advance Sheet No. 9 of Vol. 88 L. Ed., recently decided by this Honorable Court.

3.

The United States Circuit Court of Appeals decided an important question of federal law in this cause which has not been, but should be, settled by the Supreme Court.

WHEREFORE your Petitioners respectfully pray that a writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 10840, PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL, APPELLANTS, VS. FOY O. WILEMON AND AMOS E. WILEMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LUCK OIL COMPANY, A PARTNERSHIP, APPELLEES, and that the judgment of the Circuit Court of Ap-

peals may be reversed and that of the trial court affirmed; and that your Petitioners have such other relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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